United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1197

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1197

UNITED STATES OF AMERICA,

Appellant,

—against—

ANGEL ROSARIO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE

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Preliminary Statement

The Government has appealed from an order of the United States District Court for the Eastern District of New York (Bartels, J.) entered on March 10th, 1976, which order granted appellee's motion to suppress evidence obtained in a search of appellee's person.

The appellee is charged in a single count information with the unlawful possession of heroin as a misdemeanor in violation of Title 21 U.S.C. § 844(a).

Statement of Facts

The appellee was arrested at about 6:00 P.M. on April 29th, 1975, in Brooklyn, New York, while in the company of Jose Gonzalez, an individual sought for narcotic violations which had occurred on January 16th, 1975 and March 5th, 1975. These violations involved sales to an undercover police officer, Horace Balmer.

The arresting officer was George LeMoine, a New York City police officer. LeMoine had personal knowledge of who Gonzalez was but had never seen the person described to him by Balmer as Gonzalez's confederate in the heroin sales. The description was of a 28 year old white male, 5'8" tall, light complexion, weighing 155 pounds, possibly called "Angel."

A man and a woman, also in the company of Gonzalez and the appellee, were taken into custody at the same time and later released at the police station (A. 81)* LeMoine testified that before being released certainly the other male and perhaps the woman also, had been "frisked" and their clothing been examined (A. 11').

On the evening of the arrest Balmer was called in to identify Gonzalez and the appellee. He indicated that the appellee had not been involved in the prior transactions. The appellee was then charged only with the small amount of heroin found in his shirt pocket when frisked by LeMoine after his arrest.

The District Court held that the warrantless arrest and seizure was not supported by probable cause. The officer had only a general description of "Angel" and but for the presence of Gonzalez the arrest would not have taken place.

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*Page references in parenthesis refer to pages in the Government's brief.

POINT ONE

THERE WAS INSUFFICIENT PROBABLE CAUSE FOR OFFICER LEMOINE TO ARREST APPELLEE. CONSEQUENTLY, THE ATTENDANT SEARCH AND SEIZURE OF CONTRABAND WAS CONSTITUTIONALLY VOID.

It is conceded by the Government that appellee is not the "Angel" sought for the prior violations. There is no allegation that he even looks like the other individual but only that his approximate weight, height and age is similar and that he answers to the same common hispanic name of "Angel". The physical approximations by Balmer were 28 years of age, five feet eight inches tall, 155 pounds. The appellee is 32, five feet seven inches tall and 155 pounds. It is also noteworthy that the mode of dress was different at the time of arrest from that described in Balmer's report.

LeMoine conceded that not only Gonzalez and the appellee were taken into custody but the other two individuals with them, a man and a woman, were also frisked and taken to the police station (A. 111). Obviously, any person in the company of Gonzalez at the time he was arrested would have been taken into custody by LeMoine with or without the benefit of probable cause.

In determining the validity of a warrantless arrest, a reviewing court must make an objective evaluation of the facts and circumstances surrounding the arrest. See United States v. Bonds, 422 F. 2d 660 (8th Cir. 1970), Terry v. Ohio, 392 U.S. 1. An objective valuation of LeMoine's actions on the date of arrest indicate that he was

not relying on probable cause in searching appellee but rather on the guilt by association theory that anyone in the company of Gonzalez should be frisked and brought to the police station for processing (A. 111). The Government's theory would be more arguable if Gonzalez and appellee were the only two taken into custody. It fails under the facts of this case. It certainly does not meet the requirements setforth by Mr. Justice Powell in United States v. Watson, 44 U.S.L.W. 4112, 4118n. 4 (U.S. Jan. 26, 1976), "..probable cause must not only warrant a man of reasonable prudence and caution to believe that an offense had been committed, but also that the person to be arrested was the offender."

LeMoine's testimony indicates many discrepancies as to what took place at the time of arrest. When questioned concerning the other two individuals, the following questions and answers are transcribed on A.81 of the appendix:

> A. When you say you only placed Gonzalez and Angel under arrest, when you take people into custody, are they under arrest?
>
> A. Not necessarily so.
>
> Q. When you stopped that vehicle and these four people came out of the car, were the other two people free to go at that time?
>
> A. No, I would say not.
>
> Q. Were the other two people taken to the stationhouse for processing?
>
> A. No sir, not for processing.

On pages 110 and 111 of the appendix, the same officer LeMoine surprisingly describes the same incident in a different manner:

Q. Officer, were they taken into custody at the scene, yes or no?

A. Well, that's another question.

Q. Officer, were they taken into custody or not?

THE COURT: Well, taken into custody is one thing and arrested is another.

THE WITNESS: That's the question, your Honor?

Q. Were all four persons transported to the police station?

A. Yes.

Q. Were all four persons free to leave before they went to the police station?

THE COURT: Not if they're taken into custody.

A. I would say at that time, no.

Q. Were all four persons processed at the police station?

A. What do you mean by processed?

Q. What do you mean by processed?

A. Processed?

Q. Yes.

A. Fully identified.

Q. Were they processed?

A. Yes, they were.

Q. And it was only after processing them that the other two individuals were released, is that correct?

A. Yes, sir, I believe so. Yes.

Q. And prior to being processed they had been frisked and their clothing had been gone through also. Isn't that correct?

A. The girl, I really don't know.

Q. How about the man?

A. Yes. I frisked him, yes, sir.

The testimony of LeMoine is that he found the six $5.00 decks of heroin in appellee's shirt pocket during a frisk for weapons (A.72,73). It is clear that at the time LeMoine removed and seized the six decks that he did not believe a weapon was present in that shirt pocket or that his safety was in danger. Terry v. Ohio, 392 U.S. 1, 27 (1968); Brinegar v. United States, 338 U.S. 160, 174-176 (1949); Beck v. Ohio, 379 U.S. 89,91 (1964). Significantly, in a case as close as the one at bar, it cannot be logically argued that the District Court's findings were so "clearly erroneous" that this court should supplant its findings for that of the District Court.

POINT TWO

IF THE COLLECTIVE KNOWLEDGE OF THE AUTHORITIES IS ATTRIBUTED TO LEMOINE, THE ARREST WAS NOT BASED ON PROBABLE CAUSE.

The Government's case cannot be improved by giving the arresting officer less material to work with. Clearly, if the agent who had been present at the sale was present at the time of arrest, appellee should not have been arrested or searched. Although, in view of what transpired with the third man and the woman he probably would have been.

The Supreme Court had the opportunity to consider the "insulation theory" argued by the Government herein in Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560. The Court rejected the concept and stated on page 568:

> "An otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make arrest."

A similar result occurred in United States v. Mackey, 387 F.Supp. 1121 (District Court, Nevada, 1975). The defendant was picked up for hitchhiking and his name sent through the National Crime Information Center's (NCIC) computer which is conducted by the Federal Bureau of Investigation. The computer erroneously reported that he was wanted as a parole violator, although in fact, he had satisfied that warrant five months earlier. During his booking a gun was found in his bag and he was charged

with violating the Federal Firearms Statute. The NCIC report was found to be false and the District Court suppressed the gun. At least in Mackey they had the right individual. In this case, the name and description could fit many individuals.

To permit the Government to introduce the small amount of heroin found on appellee against him on trial would place them in a more favorable position where the arresting officer is not the officer with the most knowledge about the case. This is the type of "insulation" which the Supreme Court ruled against in Whiteley.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED. THE FINDINGS OF THE DISTRICT COURT CANNOT BE FOUND TO BE SO "CLEARLY ERRONEOUS" THAT THIS COURT SHOULD SUBSTITUTE ITS FINDINGS FOR THAT OF THE DISTRICT COURT.

Respectfully submitted,

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Dated: July 9th, 1976.